

# Cats or Gardens: Which Metaphor Explains Negligence? Or, Is Simplicity Simpler Than Flexibility?

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# Cats or Gardens: Which Metaphor Explains Negligence? Or, Is Simplicity Simpler Than Flexibility?

Thomas C. Galligan, Jr.\*

## I. INTRODUCTION

In *Continuing Causation Confusion*,<sup>1</sup> Professor David Robertson once again meaningfully contributes to the body of scholarship dealing with the law of negligence, particularly the law of negligence in one little corner of the world, Louisiana. Professor Robertson continues the development of a *Keetonian*<sup>2</sup> model of negligence he set out in *Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases*,<sup>3</sup> which I will refer to as *Allocating Authority*. I humbly commented on Robertson's *Keetonian* model of negligence in *Revisiting the Patterns of Negligence: Some Ramblings Inspired by Robertson*,<sup>4</sup> which I will refer to as *Inspired Ramblings*.<sup>5</sup> Now, I will once again take up the mantle of commentator, attempting to highlight what I see as both the appeal of and the problems with Robertson's *Keetonian* model of negligence. My thesis is not that Robertson's *Keetonian* model is somehow unsound. It is most sound. How could it not be? After all, it is Robertson who has proposed it. Rather, I contend that Robertson's *Keetonian* model is not and should not be the *only* way to analyze a negligence problem. There are other models, like the duty/risk model articulated by Leon Green and Wex Malone, and those other models are sound as well. I took up the task of praising flexibility in negligence cases in *Inspired Ramblings*. In *Continuing Causation Confusion*, Robertson has responded to some of my comments. Thus, herein I will both comment on *Continuing Causation Confusion* and respond.

## II. BACKGROUND AND THE BATTLE OF THE APPROPRIATE METAPHOR

Under Robertson's *Keetonian* model, the cause of action for negligence has five elements: duty, breach, cause-in-fact, legal cause, and damages.<sup>6</sup> Under

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1. 58 La. L. Rev. 1 (1998).

2. David R. Robertson, *Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases*, 57 La. L. Rev. 1079, 1092 (1997) [hereinafter *Allocating Authority*].

3. 57 La. L. Rev. 1079 (1997).

4. 57 La. L. Rev. 1119 (1997).

5. The careful reader will no doubt realize that I have used the same short form names for the articles that Professor Robertson uses in *Continuing Causation Confusion*, 58 La. L. Rev. at 2.

6. *Continuing Causation Confusion*, *supra* note 1, at 4; *Allocating Authority*, *supra* note 2, at 1091.

the *Keetonian* model of negligence, the judge decides duty and the jury decides all of the other elements. Robertson's *Keetonian* model probably is the most common and most traditional negligence model. It also may be *the best* (at least for some purposes), but it is *not* the only model *and* it is *not* best to discard all the other models. In fact, I do not believe even Robertson wants to totally adopt the *Keetonian* model, given what he says about violation of statute cases.<sup>7</sup>

In *Inspired Ramblings*, I closed by praising the flexibility of the multivarious approaches to deciding negligence cases courts have used and continue to use. Let me begin here where I left off there. I said:

[N]egligence like a cat has had many lives (or models) and, there's more than one way to skin a cat. When dealing with something as amorphous as negligence, flexibility seems to me to be a most attractive virtue.<sup>8</sup>

Professor Robertson believes my "cat" metaphor is inappropriate. Instead, he believes that the apposite metaphor is a garden; the law of negligence is like a garden. The "beds and rows [are] all laid out".<sup>9</sup>

Useful new ideas, terms, and approaches should be cautiously welcomed and ultimately perhaps generously nurtured—we've got our beds and rows all laid out, these beautiful new plants can't just crop up wherever they want to. And of course, lots of these new plants are far from beautiful. They are weeds, is what they are. Weeds must be weeded (out).<sup>10</sup>

In particular, Robertson takes my cat metaphor and rewrites it in "garden speak," stating:

Translated into my gardening metaphor, Galligan wants to let a thousand flowers bloom. I am inclined to view 997 of those flowers as weeds. Friends and coworkers, Galligan and I are nevertheless doing the garden and digging the weeds in philosophically different ways.<sup>11</sup>

I like Robertson's<sup>12</sup> garden motif. In a moment of self-examination while writing this paper with gardens on my mind, it occurred to me that I was born and raised in New Jersey. New Jersey is "The Garden State." Moreover,

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7. He calls them negligence per se cases. *Continuing Causation Confusion*, *supra* note 1, at 11; *Allocating Authority*, *supra* note 2, at 1109.

8. *Inspired Ramblings*, *supra* note 4, at 1132.

9. *Continuing Causation Confusion*, *supra* note 1, at 2.

10. *Id.*

11. *Id.* at 3.

12. Given my diverse geographic lineage, I will sometimes refer to Professor Robertson as Professor Robertson (the Southern influence); sometimes, I will call him Robertson (the Eastern influence); and sometimes I will just call him Dave (the Western approach).

Washington, the state in which I received my J.D. and the state in which I practiced law is known as "The Evergreen State," a second fate-driven detail concerning me and gardening.

Now, while I don't do too much gardening in Louisiana where I live and work, I see that things do grow here—like crazy. The Louisiana garden, laid out in rows, all nice and neat is surrounded by growth, all sorts of stuff. The more carefully the Louisiana gardener weeds the more time she must devote to the task. The more time one needs to weed, the smaller the garden plot becomes. While the plot shrinks, all those unweeded areas outside flourish. In a way then, the effort to meaningfully weed in Louisiana may be a little bit like trying to train a cat to roll over. Good luck!

Returning to torts and negligence, the point is that any rigid approach to analysis is inconsistent with the practice and the tradition of the law of negligence. What I mean to do herein is to show how flexible negligence remains and to point out that Robertson's *Keetonian* model of negligence may not be quite as simple as it appears. Professor Robertson deserves high praise for his efforts in *Continuing Causation Confusion* to attempt to separate the various elements of negligence and their purposes. Separation is a laudatory, logical exercise. I am a big fan of logic but like any cynical easterner, educated in the west, and teaching in the south, I believe logic has its limits. I am also convinced that it is difficult to keep the elements of negligence as neatly separate as Robertson tries to do. It seems to me we haven't managed to keep them separate yet and we've been at it for almost 200 years. I will present my thoughts by more or less following Professor Robertson's lead and organizational scheme in *Continuing Causation Confusion*.

In Section III, I will discuss Robertson's negligence pamphlet and his image of a simple litigation process. Section IV will discuss Breach; Section V deals with Cause-In-Fact; and Section VI considers Legal Cause. In Section VII, entitled *A Running Recap*, I summarize some of the confusion I see within the *Keetonian* approach itself. Then in Section VIII, I discuss recent jurisprudence dealing with victim fault, victim knowledge, and comparative fault which reveals Louisiana courts' consistent flexibility in deciding negligence cases. Lastly, in Section IX, I set forth a brief conclusion.

### III. PAMPHLETS AND HYPOTHETICAL CONFERENCES

From his garden metaphor, Professor Robertson moves into what one might call the pamphlet approach to the organization of negligence. The negligence pamphlet has three pages. As he says, on page one is the plaintiff's *prima facie* case. What concerns me herein on page one is whether overlap of elements on page one is the profligation of weeds or the inevitable emptiness of all forms.<sup>13</sup> On page two of the Robertson negligence pamphlet are the defendant's

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13. *Continuing Causation Confusion*, *supra* note 1, at 3-4.

affirmative defenses.<sup>14</sup> What concerns me here about page two is how things jump between pages one and two and how things literally leap between page two and different elements on page one. Finally, on page three we have issues relating to allocating responsibility.<sup>15</sup> While these issues too may have an impact on pages one and two, Dave and I are not so concerned here with page three.

Robertson's pamphlet is a very useful way to help one initially understand the structure of negligence; however, I think that once one experiences some of those problems, one begins to realize that the problems in negligence cases do not fit neatly onto the three pamphlet pages. That failure to really fit is the result of a practical flexibility which has remained untamed.

In *Continuing Causation Confusion*, after describing the contents of the three page negligence pamphlet, Professor Robertson explains why he believes it is beneficial to avoid scrambling the elements on page one. He images two lawyers and a judge at work on a case, and he points out that a common vocabulary is "essential to reasoned negligence-law discourse."<sup>16</sup> A common vocabulary allows the lawyers and the judge to efficiently and meaningfully communicate. Dave then notes the logical appeal of identifying the issues where there may be overlap or confusion among the elements of negligence. I agree; however, it is my impression that to adopt the *Keetonian* approach to negligence and supposedly eliminate the overlap takes away some of the tools with which the lawyers in the Robertson image may work and some of the ways in which the judge in that image may decide the case. In some ways, as I hope to show, under the *Keetonian* model, there will be less for Robertson's imaginary lawyers and judge to work on. They will be giving most of the meaningful stuff to the jury. And I do not believe that under the *Keetonian* model things are as clear for that jury as we normally let on.

#### IV. BREACH

Now, let us move into the meat of *Continuing Causation Confusion*, the part where Robertson begins to unpack the overlap among the elements on page one.<sup>17</sup> Quite correctly, he notes that there is little chance of confusing cause-in-fact and breach. He then begins his discussion of breach. In doing so, he quotes from *Allocating Authority*. While I certainly don't want to repeat what I said in *Inspired Ramblings*, I will try my best to get in the last word. And besides, law review articles need some minimum number of pages to be respectable. Initially, Robertson ties his breach wagon to Learned Hand's formula for negligence. You

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14. *Id.*

15. *Id.*

16. *Id.* at 5.

17. We have talked of duty and the problems it presents in *Allocating Authority*, *supra* note 2, at 1092-95, and *Inspired Ramblings*, *supra* note 4, at 1120-23. We talk of it again later in these papers. For now, I have skipped duty and moved to breach.

remember the formula—one is negligent if the beforehand cost of avoiding an accident (B) is less than the probability of that accident occurring (P) times the loss which can be expected if the accident happens (L). Algebraically, one is negligent if  $B < P \times L$ .

My beef with the formula as *the* way to determine breach is that it emphasizes economic values. In *Inspired Ramblings*, I said that economic efficiency is “*the*” value served by the Hand formula.<sup>18</sup> Robertson responded by saying:

Galligan's emphasis on “*the*” imports a significant exaggeration, I think. On both the B and PL sides of the scales, courts and juries often take into account values that are in no meaningful sense economic, and properly so.<sup>19</sup>

In a footnote, he cites two cases that support his point, *Roberts v. State*,<sup>20</sup> and *Kimbar v. Estis*.<sup>21</sup> In *Roberts*, the court decided that a blind man was not negligent when he walked across a familiar public area without his cane. The court emphasized, in part, what Professor Robertson calls the blind man's “spiritual need to move around at times without his cane.”<sup>22</sup> In *Estis*, the court relied upon what Robertson calls campers' “aesthetic preferences for darkness.”<sup>23</sup> While Robertson believes that the spiritual needs of the blind man and the aesthetic preferences of the campers are not economic values, I think an economist could place a dollar value on both, or come up with a way to do so.<sup>24</sup>

Moreover, although Robertson argues persuasively that the Hand formula may not *have* to be solely aimed at economic efficiency, the fact is that economically-driven lawyers and judges, like Judge Richard Posner,<sup>25</sup> have adopted the Hand theory as *the* definition of negligence and they use the formula to explain negligence as efficiency-driven. I have no doubt Dave is not a legal economist masquerading as a guitar-playing law professor, and I know that *he* does not use the Hand formula to further a purely economic explanation for negligence. But I am afraid we are to the point that when one who does not believe the Hand formula solely serves economic values refers to the formula, he or she should attach a warning. The warning could read something like this: *Warning: Some People Believe The Hand Formula Defines Negligence Solely In Reference To Economic Efficiency; I Do Not.*

18. *Inspired Ramblings*, *supra* note 4, at 1124. See also Thomas C. Galligan, Jr., *The Tragedy in Torts*, 5 Cornell J.L. & Pub. Pol'y 139 (1996).

19. *Continuing Causation Confusion*, *supra* note 1, at 7.

20. 396 So. 2d 566 (La. App. 1st Cir.), *aff'd on other grounds*, 404 So. 2d 1221 (La. 1981).

21. 135 N.E.2d 708 (N.Y. 1956).

22. *Continuing Causation Confusion*, *supra* note 1, at 7 n.26.

23. *Id.*

24. See, e.g., *Mercado v. Ahmed*, 974 F.2d 863 (7th Cir. 1992).

25. See, e.g., Richard Posner, *The Economic Analysis of Law* § 6.1 (1992).

I reiterate here, as I did in *Inspired Ramblings*,<sup>26</sup> that the reasonable person standard is aimed at, or can be aimed at, more than just furthering our culture's craving for economic efficiency. The reasonable person standard allows jurors to decide how careful they want others to be. Reasonable care may require consideration of much more than efficiency-driven concerns. Reasonable care may reflect a sense of compassion and community that we normally do not think of in economic terms. As Robertson points out, we do not ordinarily think of the spiritual needs of the blind or the aesthetic preferences of campers in economic terms. In *Continuing Causation Confusion*, Professor Robertson calls the jury's breach decision "norm applying."<sup>27</sup> I agree. My point, and I believe Dave and I agree, is that economic efficiency is *not* the only norm applied.

More broadly, the Hand formula is a type of risk/utility test, and risk/utility tests have come to dominate modern tort law's effort to set standards in negligence, strict liability, and even absolute liability cases. I am not sure breach, a/k/a the reasonable person standard, must be limited to risk/utility concerns. Might it reach beyond that? I am also left to wonder, inspired by Professor Leslie Bender,<sup>28</sup> whether the reasonable person standard requires a person to reason about injury and risk, as the word implies. Perhaps, the standard should be the ordinary<sup>29</sup> person standard, instead of the reasonable person standard. Replacing reasonable with ordinary allows for the possibility that when a person decides, perhaps instantly and subconsciously, how much care to take to protect another (or one's self in a contributory negligence case) from a risk, one does not necessarily "reason." Instead one may make some intuitive, non-reasoned decisions. These may be expected, even if not reasoned about. In any event, it is for all these reasons that I prefer not to hang my hat totally on the Hand formula, at least not without a warning.

Interestingly, after stating that courts employing the Hand formula or a variant thereof consider non-economic values, Robertson says:

At bottom, the breach issue is simply (but potentially comprehensively) whether the defendant behaved properly, as judged by his peers. There is more to proper behavior than economics.<sup>30</sup>

I agree. But one could ask a jury to decide whether one has behaved properly or reasonably just like that: Did defendant behave reasonably? There is no obvious need to get into B<PxL and all that jazz. Consistently, when in Section VII of *Continuing Causation Confusion*, Professor Robertson sets forth his proposed jury instructions on negligence, he talks about reasonable care and what

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26. *Inspired Ramblings*, *supra* note 4, at 1124-25.

27. *Continuing Causation Confusion*, *supra* note 1, at 7.

28. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Law*, 38 J. Legal Educ. 3 (1988).

29. Of course we often refer to the reasonable person as the ordinary prudent person.

30. *Continuing Causation Confusion*, *supra* note 1, at 7.

reasonable people of ordinary prudence do under the same or similar circumstances. In Section VII, Dave does not mention the Hand formula. Consequently, I am a little bit unclear what role the Hand formula plays in Robertson's *Keetonian* model of negligence. He articulates the formula as a way to determine breach which he says is a question for the jury, but then his jury instruction on breach does not refer to the formula.<sup>31</sup>

Should courts instruct juries under the Hand formula or not? H. Alston Johnson, III in his *Civil Jury Instructions*<sup>32</sup> includes a Hand formula instruction. Professor Stephen Gilles has argued that juries should be instructed on the Hand formula.<sup>33</sup> The Louisiana Supreme Court has used the Hand formula on several occasions to define breach in both negligence cases and strict liability cases.<sup>34</sup> Obviously, economic thinkers applying and interpreting the Hand formula have had a great impact. And, even if efficiency is not *the* value behind negligence, our society is critically concerned with economic efficiency. Thus, it would probably not be erroneous to give a jury instruction using the Hand formula to define negligence.

Concomitantly, it should not be erroneous to fail to instruct the jury on the Hand formula but to use some other definition of reasonable care, like the one Robertson uses in his proposed jury instructions in *Continuing Causation Confusion*. Moreover, it should not be error for a trial court to give a jury alternative definitions of reasonable care, one based on the Hand formula and another grounded in a more general, less economically-driven base.<sup>35</sup> After all, the trial judge has great discretion in instructing the jury as long as the instructions given adequately express the applicable law.

I will have more to say about breach but that will have to wait until we arrive at the legal cause element. For now, let me summarize by saying that it appears there is more than one way to define breach, even to Robertson. Leaving aside the possibility of deleting the word "reasonable" altogether, there is the Hand formula and there is a more narratively-based, less economically-driven, and less algebraic reasonable person standard: the one Robertson employs in his jury instruction. To continue the cat motif there are at least two

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31. It is doubtful that Robertson intends that the appellate court, but not the jury, should apply the Hand formula. To do so would imply more aggressive review of jury decisions on breach than has traditionally been the practice. In a slightly different context, Robertson objected to such heightened review in *Allocating Authority*, *supra* note 2, at 1097-98, 1106-08. There, he objected to *de novo* appellate review of breach decisions in negligence and strict liability cases.

32. H. Alston Johnson, III, *Civil Jury Instructions*, in 18 Louisiana Civil Law Treatise § 3.03 (1994).

33. Stephen G. Gilles, *The Invisible Hand Formula*, 80 Va. L. Rev. 1015 (1994).

34. See, e.g., *Sistler v. Liberty Mut. Ins. Co.*, 558 So. 2d 1106 (La. 1990) and *Levi v. SLEMCO*, 542 So. 2d 1081 (La. 1989).

35. A critical caveat here concerns design cases arising under the Louisiana Product Liability Act, La. R.S. 9:2800.56 (1988). The relevant statute codifies a type of risk/utility test, La. R.S. 9:2800.56(2) (1988); thus, the plaintiff must prove its case under that statutorily-defined risk/utility test and a failure to instruct under the statutory test would be reversible error.



ways to skin breach. Or, put less violently, breach has at least two lives. Gardening wise: there are at least two rows for breach in our garden.

#### V. CAUSE-IN-FACT: THE "BUT FOR" TEST

Professor Robertson's section on cause-in-fact in *Continuing Causation Confusion*,<sup>36</sup> based upon his article *The Common Sense of Cause in Fact*,<sup>37</sup> is a brilliant discussion of the issue. It is as clear a text on the topic that one hoping to understand the "but for" test for cause-in-fact could hope to find. The "but for" test asks whether, but for the defendant's negligence, the plaintiff would have avoided injury.<sup>38</sup> There are other cause-in-fact tests, like the substantial factor test, but the most commonly used test is the "but for" test. Other tests may be saved for more difficult, dicey policy infected cause-in-fact cases. We need not worry about those here.

In *Continuing Causation Confusion*, Robertson makes several critical points. First, cause-in-fact focuses upon whether "*this* defendant's *particular* conduct"<sup>39</sup> caused "*this* victim's *particular* injuries."<sup>40</sup> Thus, when the jury (and Dave and I both agree that the jury decides cause-in-fact) decides cause-in-fact, it must be careful to focus on the plaintiff's alleged particular injuries and on the defendant's alleged negligent conduct.

It would seem most helpful for courts to ask juries particularized cause-in-fact interrogatories, framed in reference to the particular factual allegations. Imagine a case where the plaintiff alleges that the defendant was speeding and the speeding was the cause-in-fact of a rear end collision in which the plaintiff, driving the car with which defendant collided, suffered whip lash. Rather than generally asking the jury to decide whether the defendant was the cause-in-fact of the plaintiff's injuries,<sup>41</sup> it would make things clearer for the jury if the judge asked: do you find that the defendant's speeding was the cause of the collision and do you find that the collision caused the plaintiff's whip lash?<sup>42</sup> You will

36. *Continuing Causation Confusion*, *supra* note 1, at 7-10.

37. 75 Tex. L. Rev. 1765 (1997).

38. Dan B. Dobbs and Paul T. Hayden, *Torts and Compensation* 180 (3d ed. 1997).

39. *Continuing Causation Confusion*, *supra* note 1, at 7-10.

40. *Id.*

41. While Robertson gives a general cause-in-fact instruction in his paper (I will later too), perhaps he would agree with me that it might be helpful to tailor that instruction to the facts of the particular case.

42. While I don't want to waste time on it in text, I'm surprised we don't see more directed verdicts on cause-in-fact. It seems to me that in lots of cases, cause-in-fact is an open and shut issue. If what the defendant did was negligent and the plaintiff's injuries were within the scope of the defendant's duty (i.e., the defendant legally caused the plaintiff's injuries) then cause-in-fact frequently is obvious; reasonable minds could not differ. In such a case, there is no reason to give the cause-in-fact issue to the jury. Granted there are cases where the plaintiff claims injury and the defendant says its conduct did not cause that loss; then there is a cause-in-fact issue, or more precisely an issue of whether the plaintiff was hurt at all. See Dobbs and Hayden, *supra* note 38, at 177-80 (Dobbs and

note that I have not used the words "cause-in-fact." I see no need to. People know what cause means.

In any event, Dave makes the factual and particular focus of the "but for" question clear. He also breaks down the mental gymnastics required by the "but for" test into five (not always so easy) pieces or steps: (1) identify the injury; (2) identify the wrongful conduct; (3) correct the conduct; i.e., make the wrong right; (4) ask whether the plaintiff would have still been hurt if the defendant hadn't done what it (allegedly) did wrong; and, (5) finally, answer the question just asked.<sup>43</sup> Most helpfully, Robertson then supplies us with a high-tech metaphor, at least it's high-tech to me. He suggests that the factfinder should imagine a videotape of what happened. Then it should go back and change only the defendant's wrongful conduct in the videotape. Next the factfinder should "run" the videotape again. If in the changed version the plaintiff is still hurt (to the same extent)<sup>44</sup> then defendant was not a cause-in-fact of the plaintiff's injuries. If the plaintiff is not hurt (in the same way) then the defendant was a cause-in-fact of the plaintiff's injuries. If the new tape is snow and the viewer can't see anything, the plaintiff has not proven his or her case. I have no beef with Robertson on any of this. I praise him and plan to refer his work to my students who are trying to understand the "but for" test for cause-in-fact.

What I would like to do is kick up a little dust about the "but for" test itself. Particularly, I'd like to fuss about its counterfactual nature and the ability of most jurors to understand the "but for" test. Can a juror, absent clear instruction, figure out that what it must do to decide cause-in-fact is to decide what would have happened if what did happen didn't happen. I don't mean to make it harder than it is but counterfactuals are tough. When initially presenting the paper *Continuing Causation Confusion* to the Louisiana Judicial College, Dave said that the chief virtue of the "but for" test was its analytic precision. I think that he is right. The chief virtue of "but for" for judges, torts teachers, and lawyers is its analytic precision. But I'm not so sure analytic precision is always such a virtue to jurors. One person's analytic precision is another person's "huh?"

As I said above, Dave does all sorts of great things in the cause-in-fact ("but for") section of *Continuing Causation Confusion*, breaking "but for" down into five analytical elements and rolling his videotape metaphor. But then, when he

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Hayden have added a section to their book right before cause-in-fact which they entitle "Actual Harm"; i.e., did the plaintiff suffer any?).

43. *Continuing Causation Confusion*, *supra* note 1, at 7-10.

44. I have added "to the same extent" because if the plaintiff would still have been hurt even if defendant's conduct was "corrected," but hurt less seriously than alleged, the defendant would be the cause-in-fact of the "aggravated" injuries which the plaintiff suffered. However, the plaintiff's damage award only should be for an amount equal to the difference between the "value" of the injuries which the defendant caused and the "value" of the injuries which the plaintiff would have suffered anyway. See *Degruipe v. Houma Courier Newspaper Corp.*, 683 So. 2d 689 (La. 1996); *Dillon v. Twin State Gas & Elec. Co.*, 163 A. 111 (1932).

drafts his jury instruction, he doesn't really tell the jury about any of that fine stuff. Instead he proposes the following instruction:

(2) Was [the trucker's] negligent conduct a cause of the injuries to [the plaintiff]?

*"Cause" means a necessary contributing factor. The law recognizes that each event and each injury has many causes. If you believe that the plaintiff would probably have not suffered the claimed injuries in the absence of the defendant's negligent conduct, then you should answer this question yes. If you believe that the plaintiff probably would have suffered those injuries regardless of what the defendant did or failed to do, then you should answer this question no.*<sup>45</sup>

You will recall that when I wrote my rear end collision, whiplash instruction above, I simply used the word cause, not cause-in-fact. Dave does the same thing. As he notes,<sup>46</sup> and I agree, "cause 'means cause in fact' to the layman." I will offer my own proposed instruction later. I will try to make the language simpler. I will cut out the "necessary contributing factor" language. I believe people know what "cause" is without being told about necessary and contributing. If Dave is worried about people who think there is only one cause of an accident, I do not object to telling the jury that there are many causes of every accident. I also like the part of Dave's instruction that tells the jury that if the plaintiff would have suffered the injuries anyway then the defendant's conduct is not a cause-in-fact of the plaintiff's injuries. Other than these little "nits," I applaud the cause-in-fact section of *Continuing Causation Confusion*.

## VI. LEGAL CAUSE

Well, so far, it's been relatively easy. There hasn't been much serious disagreement but now, even though it may not get violent, the sledding will be a little tougher because, as I see it, here's where stuff really starts turning to mush. Here's where Dave really wants me to weed, and I can't see the point or the desirability of holding the rows back and pushing some of the wildflowers (he calls them weeds) out. Here's where I think Dave is trying to train cats to fetch. But, before we get to cats and gardens, let me praise Robertson and agree with him wholeheartedly when he says that if the jury is the appropriate decision maker on the legal cause question, then the jury should receive separate instructions on cause-in-fact and legal cause.

The Louisiana Code of Civil Procedure<sup>47</sup> does not expressly provide for separate instructions; but, as Dave points out, one may and should read the Code to imply that courts should give two separate instructions. Whatever one may

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45. *Continuing Causation Confusion*, *supra* note 1, at 23.

46. *Id.* at n.88.

47. La. Code Civ. P. art. 1812.

feel about what Leon Green and Wex Malone did in terms of lobbying for increased power for judges (in deciding what until then had been called the proximate cause issue) one of their most significant achievements was to show American judges and lawyers that cause-in-fact and proximate cause were separate inquiries. Cause-in-fact inquires as to causal relation. Proximate or legal cause focuses on the scope-of-protection. Lumping the two together would be as confusing today as it was when Green and Malone put pen to paper. Dave and I agree here: give two instructions. Now, to our differences.

According to Robertson's *Keetonian* model, legal (proximate) cause is that part of the negligence case where the applicable decision maker determines the scope-of-liability or the scope-of-protection. One trained under Leon Green or Wex Malone might say this is where the scope of the defendant's duty is determined. Robertson does not use that phraseology. I believe he does not use that phraseology because scope-of-duty implies a decision for the court. That is, duty is a question of law for the court so, logically, one might conclude scope-of-duty was a question for the court as well. Green, Malone, and Cardozo (at least in *Palsgraf*<sup>48</sup>) thought so. Robertson does not. He believes that juries are the appropriate entities to decide legal cause. He is by no means alone; what he states is the majority and the traditional view. There is great wisdom in it. I agree with it myself.<sup>49</sup> But, I don't agree all the time, which is why I am not such a good gardener.

In *Continuing Causation Confusion*, after presenting some historical highlights of the development of "legal cause," Dave defines the term. Robertson says that the legal cause issue answers the following question:

Was the rule of law violated by the defendant designed to protect the plaintiff's general class of persons against the harm the plaintiff suffered?<sup>50</sup>

He then goes on to note that in a violation of statute negligence case (he uses the term "negligence per se") the rule of law violated is the statute. What about in a non-violation of statute case, an ordinary negligence case?

In an ordinary negligence case, the rule of law violated by the defendant is not quite so easy to identify. But the difficulty is manageable. In an ordinary negligence case, the plaintiff proves that the defendant was a law-violator by proving that he or she engaged in conduct that was less than reasonable under the circumstances. In order to establish that the defendant did not exercise reasonable care, the plaintiff must produce

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48. *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

49. See, e.g., Thomas C. Galligan, Jr., *Hill v. Lundin & Associates, Inc.: Duty Risked to Death?* 90-92 (LSU Publications Inst. 1993) [hereinafter *Duty Risked to Death?*]; Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 La. L. Rev. 1509 (1993) [hereinafter *Patterns of Negligence*].

50. *Continuing Causation Confusion*, *supra* note 1, at 14.

persuasive evidence that the defendant's conduct created or exacerbated one or more foreseeable risks of harm to others. That array of risks—the array of foreseeable risks of harm that the defendant should have guarded against—identifies and defines the rule of law the defendant violated. The legal cause issue then becomes: Was the injury that befell the plaintiff among or associated with the array of foreseeable risks which required the defendant to alter his or her conduct?<sup>51</sup>

This is critical stuff and it requires a little bit of unpacking. Let's start with the relevant "rule of law" in a plain old negligence case. Initially, I think "rule of law" is an unfortunate term with which Dean Green and Professor Malone stuck us. I say it is unfortunate because I hypothesize they used the phrase for its logical pull and stylistic symmetry, not for its descriptive power.

The symmetry arises from violation of statute cases. There, the legislature has spoken and said: "Thou shall not [insert relevant statutory prohibition or condition]." The court adopts the statute as the standard of care in a negligence case based upon whether the plaintiff is within the class of persons the statute was designed to protect and the risk which arose was within the class of risks which the statute was enacted to guard against. Once the court adopts the statute, it is fair to say that there is a rule of law applicable to the negligence case. There is a legislative statement that the defendant should not have . . . [insert relevant statutory prohibition or condition].

Contrariwise, in a normal negligence suit there is no legislative prohibition or condition. There is only an allegation that the defendant behaved in a way in which the reasonable person would not have behaved under the circumstances. The plaintiff has alleged that the defendant breached the reasonable person standard and, if the plaintiff hopes to win its case, it has provided the court and the jury with some specific allegation of how the defendant violated the applicable standard. The plaintiff says that the defendant acted unreasonably because it did something it should not have done. It is that allegation of wrongdoing (or thou shalt not) which becomes the relevant "rule of law." But it's not a rule in the way we usually think of the phrase. Certainly, it is not a legislative pronouncement. Moreover, it isn't even binding in the next case.

Let me use the facts of *Palsgraf v. Long Island Railroad*<sup>52</sup> to explain. You recall that in *Palsgraf* railroad workers employed by the Long Island Railroad pushed a passenger from behind; he lost his balance and dropped a package. The package contained fireworks. The fireworks exploded, the concussions from the explosion knocked down a scale, which fell on Helen Palsgraf, causing her injuries. She filed suit against the railroad. What was the "rule of law?" There was no New York statute involved. Following what I said above, the rule of law directly relates to the particular alleged act of negligence. In *Palsgraf*, if the

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51. *Id.*

52. 162 N.E. 99 (N.Y. 1928).

court had gotten by duty (which it did not) and decided breach and if it had decided that the defendant breached its duty to act reasonably when it pushed the man from behind, the rule of law would have been: "Thou shalt not push passengers from behind."<sup>53</sup> The "rule of law" takes the alleged negligent conduct and turns it into a "Thou shall not . . . ."

Fine and dandy, but to describe the plaintiff's specific allegation of wrongdoing as a rule of law is a misnomer. First, because there is no legislative expression involved and second, because traditionally<sup>54</sup> the breach question is a question for the jury, it is case-specific. A jury finding that a defendant acted unreasonably under certain circumstances has no precedential value in a later suit, except to the extent collateral estoppel may be available to a later plaintiff as a sword. Normally, since a finding of breach (or lack thereof) is case-specific, it is inaccurate to say that a jury finding of breach establishes a rule of law. Finally, even when a court decides breach in a case tried to the court, the court's decision on breach is no more a rule of law than a jury's finding of breach.<sup>55</sup>

Why then have we used the phrase "rule of law" in reference to legal cause at all? I think it is because Green and Malone used the phrase. And they used it because they were attempting to convince courts to decide the proximate cause question, rather than give it to the jury. Green and Malone were attempting to get courts to do in ordinary negligence cases what they did in violation of statute cases—decide the scope of the defendant's duty. And in violation of statute cases, there was a "rule of law,"—the statute. I believe that is why Green and Malone refer to rules of law in ordinary negligence cases. Their use of the phrase set up a logically symmetrical pattern between what judges do in violation of statute negligence cases, decide the scope of the (statutory) duty and what Green and Malone wanted judges to do in garden variety (non-violation of statute) cases, decide proximate cause.

Interestingly, Robertson generally does *not* want judges to decide proximate cause; however, he still uses the phrase "rule of law." Perhaps, he only uses the phrase to help us focus on what he means by legal cause. I have quibbled too long. My point is only that I do not believe that a finding of breach transfers a case-specific allegation of unreasonable conduct into a rule of law. But if it does, then why shouldn't the court decide the scope of that so called "rule of law"? I'll come back to that.

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53. Perhaps Mrs. Palsgraf would have admitted some exceptions to her rule of law or would have said that the railroad can push passengers from behind but not those with packages. Whatever, the important point is that the "rule of law" in an ordinary negligence case is directly and necessarily based upon the plaintiff's particular alleged act of wrongdoing.

54. See *Inspired Ramblings*, *supra* note 4, at 1126-30. There I talk about a series of recent Louisiana appellate decisions which indicate the breach decision in Louisiana may well be a legal question, as opposed to a mixed question of fact and law, hearkening back to a now largely abandoned view of the allocation of decision making power.

55. One should note the material cited and commented upon in *supra* note 54.

For now, let me return to Robertson's definition of legal cause. I believe I have only gotten so far as to show that the "rule of law" at stake is the particular defendant's misconduct. Thus, the "rule of law" applicable to the legal cause question is established at the breach element. Once the jury determines breach, it has articulated the so-called "rule of law." Then, according to Robertson, the jury must determine whether the risk which actually occurred was one of the risks which made the defendant breach (negligent with a little "n") in the first place. Put differently, at the legal cause stage of the proceedings, the jury considers whether the risk which actually occurred was one of the risks which made what the defendant did a breach of the standard of care. So, at legal cause, the jury decides whether the reason it held the defendant breached the standard of conduct of a reasonable person under the circumstances included the risk which occurred in the case before the court. What, may I cynically ask, was the jury thinking about when it decided breach?

Wouldn't common sense tell us that the jury, when deciding breach, pondered over what happened in the particular case before the court? At breach the jury is asked to decide whether the defendant acted unreasonably in light of foreseeable risks. Then, at legal cause, we ask the jury to consider whether the risk which transpired was one of the very risks which made the conduct unreasonable at the breach element. I believe most people untrained in (or unhampered by) the law would have decided breach in light of exactly what it was that happened in the particular case they were asked to decide and not some other case. It is this common sense notion which led me in *Inspired Ramblings* to wonder whether we needed to ask the jury to decide both breach and legal cause.<sup>56</sup> For those of you who do not have that piece in front of you now, I wrote:

One wonders if, in fact, *all* factors are relevant, then don't the things juries look at when considering proximate cause overlap with the things they look at when considering breach. To quote Pete Townsend: "you better; you better; you bet." One wonders whether we need two separate elements (breach *and* proximate cause) as opposed to one, especially if the jury decides *both* elements. Maybe it is because law has got to have some minimum number of serious elements and if there aren't enough elements to be respectable it's embarrassing. Again to

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56. I do confess that in *Inspired Ramblings*, *supra* note 4, at 1130-31, I cynically queried whether negligence needed some minimum number of elements to respectfully be seen as law. I was being cynical, but I was being a little serious too. I think the flexibility of negligence is a good indication that fairness and social policy are more openly important in torts than any other area of the law. In *Inspired Ramblings*, *supra* note 4, at 1123 and 1130, I referred to Professor James Henderson for the proposition that one of the reasons we traditionally allowed juries to decide breach under the reasonable person standard was to save a little face and avoid the admission that there wasn't much "law" there after all, or at least not much. Unlike Henderson, who counsels the retention and development of rules in tort law, I am more content to live with standards and flexibility.

steal a page from Professor Henderson, maybe the only way to get people to think there is *law* here is to make it look more like law. Too few elements (articulated criteria upon which to base decision) don't look like law. So, adding elements, even if they overlap makes negligence look more like law, i.e., it makes negligence look more like the mail box rule or the rule against perpetuities (pardon my common law bias).<sup>57</sup>

My statement, particularly the last three sentences, led Robertson in *Continuing Causation Confusion* to write:

In my view, Galligan is twice wrong here [Ouch!]. The breach and legal cause elements do not overlap—not when they're done right—so the legal cause element needs no nouveau-realtitick explanation.<sup>58</sup>

Twice! I can see once maybe (at least the way Dave sees negligence) but twice? Dave then goes on to postulate a system where there is no legal cause element to prove why one is needed. He's right about the need to have some limit on liability spiraling out of control. But that limit *can* be provided by the breach element. And there is respectable jurisprudence which uses the breach element to provide that limitation.

As Robertson notes, we could ask the jury to decide whether the defendant failed to exercise reasonable care in light of the particular risk which occurred in the particular case, i.e., would a reasonable person have exercised care to avoid *this* risk? If the answer is "no" then there is no breach and no liability. As Dave points out, this is precisely what the Privy Council did in the famous *Wagon Mound I*<sup>59</sup> case. This is also what the Louisiana Supreme Court did in *Entrevia v. Hood*.<sup>60</sup> There, the court decided that an old, broken down, abandoned farmhouse did not present an unreasonable risk of harm<sup>61</sup> to a trespassing woman who was scouting out the place as a possible location for unauthorized conjugal visits with her husband, a member of a chain gang. While the farmhouse may have been unreasonable to a child, it was not unreasonable in light of the particular risk posed to the plaintiff. In current terms, there was

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57. *Id.* at 1130.

58. *Continuing Causation Confusion*, *supra* note 1, at 16.

59. *Overseas Tankship Ltd. v. Morts Dock & Eng'g Co. (Wagon Mound I)*, 1961 App. Case 388.

60. 427 So. 2d 1146 (La. 1983).

61. While *Entrevia* was a strict liability case under Louisiana Civil Code article 2322, determining whether a building imposed an unreasonable risk of harm was akin to determining whether a defendant in a negligence case acted unreasonably. The only difference was that in a strict liability case under Article 2321 (or under Louisiana Civil Code article 2317) a defendant was irrebuttably presumed to know of the alleged defect in its thing. The plaintiff did not have to prove actual or constructive knowledge. See Thomas C. Galligan, Jr., *Strict Liability in Action: The Truncated Learned Hand Formula*, 52 La. L. Rev. 323 (1991).



no breach (to the particular plaintiff involved) and no negligence (with either a little "n" or a big "N") because a reasonable person would not have taken care to avoid the particular risk which occurred in the case.

Additionally, the Louisiana Supreme Court more or less followed the *Wagon Mound I* foresight approach to proximate or legal cause in *Pitre v. Opelousas General Hospital*.<sup>62</sup> There, the court said that a defendant in a negligence case was the legal cause of those injuries or risks which made its conduct negligent in the first place, no others. That is, the negligent defendant would be a legal cause of those injuries or risks which it should have foreseen beforehand.<sup>63</sup> In essence, if legal cause is limited to those risks which made the defendant negligent in the first place, the breach and legal cause elements are collapsed. Both *Entrevia* and *Pitre* are instances where the Louisiana Supreme Court followed the *Wagon Mound I* approach. In Learned Hand formula terms, the *Wagon Mound I* approach to legal cause essentially provides that one is the legal cause of those injuries or risks for which B was, in fact, less than PxL. Concomitantly, one is not the legal cause of those injuries or risks for which B is greater than PxL, even though one's conduct may have been deficient in light of some other risk; i.e., there were some risks for which B < PxL, but not this one.<sup>64</sup>

While the Louisiana Supreme Court has employed the *Wagon Mound I* approach to legal cause (and breach), it has not limited itself to that approach. For one, Louisiana, like other civilized jurisdictions the world over, follows the "thin skull rule."<sup>65</sup> Moreover, Louisiana courts have imposed liability where the defendant owed and breached a duty to a hypothetical blameless plaintiff, even though the actual plaintiff before the court was blameworthy and had actual knowledge of the relevant risk.<sup>66</sup> In such a case, a *Wagon Mound I* approach might lead to the conclusion that while the defendant may have breached some duty owed to a blameless plaintiff, it did not breach any duty owed to a blameworthy plaintiff with actual knowledge of the relevant risk (and no compulsion to engage in the relevant activity). In *Smith v. Louisiana Health and Human Resources Administration*,<sup>67</sup> which Dave discusses in *Continuing Causation Confusion*, the appellate court held that a health-care provider which negligently failed to restrain a disoriented, elderly patient was liable where the patient left his hospital ward, got into and drove off in an ambulance in which the keys had been left, and was killed when he crashed.<sup>68</sup> A *Wagon Mound I*

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62. 530 So. 2d 1151 (La. 1988).

63. *Id.* at 1161-62.

64. *Id.* at 1159-62. See also Frank L. Maraist and Thomas C. Galligan, Jr., *Louisiana Tort Law* § 5-5 (1996).

65. *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1161 (La. 1991).

66. *Murray v. Ramada Inns*, 521 So. 2d 1123 (La. 1988).

67. 637 So. 2d 1177 (La. App. 4th Cir. 1994).

68. *Smith v. Louisiana Health and Human Resources Admin.*, 637 So. 2d 1177 (La. App. 4th Cir. 1994), cited in Maraist and Galligan, *supra* note 64, § 5-13, at 136 n.168.

approach might have resulted in the conclusion that while the defendant did breach its duty to protect the patient from some risks, there was no breach as to the risk of being killed in a collision in a stolen ambulance (and hence no legal cause). The court did *not* follow that approach.

Robertson is critical of the *Wagon Mound I* approach to legal cause, precisely because it collapses the breach and legal cause elements. He says, "our altered breach element would also give us lots of answers we don't want."<sup>69</sup> His concern is that if we collapse breach and legal cause we get the wrong answers in particular cases. He says:

We need the legal cause requirement to keep negligent defendants from being held liable "for all consequences . . . until the end of time," but we don't want a rule that would routinely exculpate conduct merely because the foreseeable risk that the conduct created does not happen to be the particular risk that befell the plaintiff. . . . The formulation that coalesces breach and legal cause—sometimes called "the *Wagon Mound* aberration"—is bad law because it would restrict liability more than anyone seriously thinks liability should be restricted. And it is bad law for another reason as well: It is a distortion of the normal meaning of the term negligent conduct.<sup>70</sup>

But, why is collapsing the breach and legal cause elements too restrictive? Do we want to hold the defendant liable for unforeseeable risks? In the run of the mill case? I believe the answer is usually "no." It seems to me that whatever we law professors may have thought about it, limiting liability to the foreseeable is the lesson to be learned from the 1996 demise of strict liability in most Louisiana tort cases<sup>71</sup> and the 1988 death of the unreasonably dangerous *per se* category of liability in Louisiana product liability cases.<sup>72</sup> The reader will recall that under that category of liability a manufacturer which produced a product whose danger in fact outweighed its utility was liable even if the manufacturer neither knew nor should have known of the product's danger at the time the product left its control. The legislature acted quickly to quash that category of liability.<sup>73</sup>

I gain further support for my view that liability generally should be limited to foreseeable risks from *Pitre* and from Professor Robertson himself. As I said, Dave believes *Wagon Mound I* overly restricts liability. I take it he does not always think it fair to limit liability to the foreseeable. However, despite his

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69. *Continuing Causation Confusion*, *supra* note 1, at 18.

70. *Id.* at 18-19.

71. Frank L. Maraist & Thomas C. Galligan, Jr., *Burying Caesar: Civil Justice Reform and the Changing Face of Louisiana Tort Law*, 71 Tul. L. Rev. 339 (1996).

72. *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986).

73. La. R.S. 9:2800.56(1) and (2) (1991). See also Thomas C. Galligan, Jr., *The Louisiana Products Liability Act: Making Sense of it All*, 49 La. L. Rev. 629 (1989) and John Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 La. L. Rev. 565 (1989).

protestations, his proposed jury instruction on legal cause relies heavily on foreseeability. It provides:

(3) Was the event that injured [the plaintiff] a reasonably foreseeable result of [the trucker's] negligent conduct?

*"Event" means the general circumstances of the injury as it befell the plaintiff. If you believe that a person in [the trucker's] situation would have foreseen that [the plaintiff's] injuries, or some similar event, might reasonably result from his conduct, then you should answer this question yes. If you believe that [the plaintiff's] injuries were a wholly unforeseeable event, of a sort not easily associated with [the trucker's] conduct, then you should answer this question no.*<sup>74</sup>

You see then that Robertson himself relies heavily upon foreseeability to define legal cause. Granted, he is careful not to limit what must be foreseen to the particular event which occurred. One could foresee a similar event and still be a legal cause of an unforeseen but similar event. Perhaps, this is sufficient in and of itself to limit the perceived evils of *Wagon Mound I*. But, how similar does the event have to be? Additionally, Robertson says the jury should find no legal cause if what occurred is a "wholly unforeseeable event." It seems to me there is some room between foreseeing the particular event, or a similar event and a wholly unforeseeable event, but be that as it may. While I'm in the neighborhood, I wonder how a jury is supposed to know how or when an event is easily associated with a risk. I have been critical of the easily associated test for a while.<sup>75</sup>

Let me also point out that Robertson uses the word "foreseen" in his legal cause instruction but not in his breach (or negligence) instruction. Perhaps that distinction also is enough to distance his approach from *Wagon Mound I*, but I think not because, as I noted above, in his breach instruction Robertson asks the jury to consider whether the defendant acted as a reasonable man under the circumstances; thus, foreseeable risks will come into play in that determination. So, while Robertson's legal cause instruction does not *per se* endorse the *Wagon Mound I* approach, it does rely upon the same concept of foreseeability that the *Wagon Mound I* court used.

Now, let us examine in greater depth why Robertson objects to the *Wagon Mound I* collapsing of breach and legal cause. The answer lies, in part, in a footnote. Therein, he says, in part:

When the Privy Council said that culpability "admittedly" depends "on the reasonable foreseeability of the damage in suit," it generated . . . [a] false premise. In the traditional formulation, culpability (negligence; breach) depends on the reasonable foreseeability of the array of risks

74. *Continuing Causation Confusion*, *supra* note 1, at 23-24.

75. Galligan, *Duty Risked to Death?*, *supra* note 49, at 89-90.

shown by the evidence to have been created or exacerbated by the defendant's conduct, not just the damage in suit.<sup>76</sup>

All right then, the problem with the *Wagon Mound I* formulation of legal cause and breach is that it focuses on the particular risk rather than on the general array of risks which the plaintiff's conduct poses. Moreover, according to Robertson, echoing Judge Andrews' famous dissent in *Palsgraf*, the *Wagon Mound I* formulation is a "distortion of the normal meaning of the term *negligent conduct*."<sup>77</sup> That is, the lay person thinks one is negligent whenever one acts carelessly in exposing others to risk, even if those others avoid injury. Do we know jurors agree on this? Do we know jurors do not focus on the particular risk? If Robertson believes jurors should focus on the general array of risks, shouldn't his proposed negligence instruction tell jurors that fact? Or, is it unnecessary because of the "normal meaning of the term *negligent conduct*"? I do not know or have answers to these questions, but I cannot say, given the doubt I do have, that it is best to accept one approach to the issue (the *Keetonian* model) and reject another, which has been used both here and elsewhere and continues to be used (the *Wagon Mound I* model).

Moreover, even assuming that the jury when deciding breach should consider the general array of risks rather than the particular risk, I am still a tad bit confused about the legal cause element. Certainly, one way to keep the breach and the legal cause elements separate (after all that is what we are talking about trying to do) is to have the jury consider the general array of risks when deciding breach, but then to consider only the particular risk when deciding legal cause. For instance, at breach the jury would consider whether the defendant was negligent under a lay person's definition of negligence. According to Robertson, this would entail consideration of the general array of risks which defendant's conduct posed. Then, at legal cause, the jury would decide whether the risk which actually occurred was one of the general array of risks which led it to conclude that the defendant was negligent in the first place. That is, as Robertson says, the jury, at legal cause, would determine the scope of the "rule of law" which it "articulated" when it decided that the defendant's conduct was negligent. As he says:

The trier of fact is well situated to determine the appropriate scope of protection of its own implicitly articulated rule. That rule's proper scope of protection is a "question of policy," all right. But it is the trier of fact's own policy.<sup>78</sup>

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76. *Continuing Causation Confusion*, *supra* note 1, at 18 n.72.

77. *Id.* at 19.

78. *Id.* at 20.

I will return later to the "who should decide the legal cause" question, but let's read along with Robertson a little more to get some further insight into legal cause. Dave writes:

It is the trier of fact who should determine whether the risk that befell the plaintiff is properly and easily associated with the array of foreseeable risks that has led the trier of fact to conclude that the defendant's conduct was blameworthy.

Thus, it makes sense for the trier of fact to make the scope-of-protection/legal cause call because the trier of fact knows—better than virtually anyone else—just why the defendant should be regarded as blameworthy and whether that blameworthiness is extensive enough to embrace the plaintiff's particular harm.<sup>79</sup>

So here, as in his jury instruction, Robertson relies upon foreseeability as a defining concept of legal cause. Recall that Robertson said that coalescing legal cause and breach by analyzing the foreseeability of the particular risk "would restrict liability more than anyone seriously thinks should be restricted."<sup>80</sup> But how is it that relying on foreseeability at the legal cause step does not unduly restrict liability while relying upon it at the breach step does limit liability? Is it because at the legal cause step the jury can consider the foreseeability of similar events and not just this one? You see my problem. I am confused because I am not sure that Robertson would limit legal cause to the strictly foreseeable because, once again, to do so would unduly restrict liability. But, at the same time, he does rely heavily upon concepts of foreseeability in both his text and his proposed jury instructions.

I think Dave would agree that there are cases in which strict adherence to foreseeability would, in fact, result in overly limited liability? And so we eschew the foreseeability test. Certainly, we are jimmying with the concept of foreseeability when we say that the defendant is a legal or proximate cause of the plaintiff's injuries if the general risk which occurs is foreseeable even though the particular manner of its occurrence is not.<sup>81</sup> And what about the "thin skull rule"? It provides liability for the unforeseeable. Are rescuers always foreseeable in fact? We need not worry about that because the law has decided that as long as the rescuer is not wanton, he or she is a foreseeable plaintiff. Is a bystander's emotional distress claim foreseeable? Not necessarily, but we have a code article allowing recovery, based upon a Louisiana Supreme Court decision.<sup>82</sup> Moreover, there is respectable authority that where property damage suffered is more severe than anticipated (i.e., more severe than foreseeable), the

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79. *Id.* at 21.

80. *Id.* at 19.

81. See, e.g., *Cay v. State*, 631 So. 2d 393 (La. 1994) and *Maraist and Galligan*, *supra* note 64, § 5-13, at 135.

82. *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559 (La. 1990).

defendant is still liable if the damage is to the same general class of plaintiffs threatened by defendant's conduct and is of the same general class of injuries anticipated.<sup>83</sup> These are all instances where foreseeability itself is an inadequate test for legal cause, even though it may be generally acceptable. In other cases, even though a risk is foreseeable, we impose no liability, albeit often under a "no duty" rubric. This is true of "no duty to act" cases and the so-called fireman's rule. But, how is the jury to know such things? One way would be for the court to specifically instruct the jury in those cases where foreseeability is not determinative. The court could jettison the standard legal cause instruction in favor of a more specifically-applicable legal cause instruction. In other cases, where foreseeability is determinative of legal cause, is *Wagon Mound I*, which essentially collapses breach and legal cause into one element, so bad?

Alternatively, in at least some cases, the court could decide legal cause! This is what happens under the Green and Malone approaches to duty/risk. This is what Justice (then Judge Cardozo) did in his majority opinion in *Palsgraf*. The court could decide the scope of the defendant's duty as part of the duty question, rather than leaving it to the jury as a "legal cause" question. The court could decide whether the defendant's duty extended to protect the particular plaintiff before the court from the particular risk which arose in the particular manner in which it arose. While Professor Robertson is not so radically opposed to this idea, he does not endorse it. As I foreshadowed earlier, Dave believes juries should make legal cause decisions. As I have indicated elsewhere,<sup>84</sup> I generally agree, but not all the time. Remember, if I stand for anything in this little debate, it's flexibility.

In support of the idea that judges might decide legal cause or scope of duty, in *Inspired Ramblings*<sup>85</sup> I noted that judges decide the scope-of-duty issue in a violation-of-statute negligence case. Dave responded as follows:

Here again I respectfully disagree in part with Professor Galligan. I believe the answer to his rhetorical question [asking why don't judges decide scope of duty or legal cause in a plain old, garden variety, non-violation-of-statute tort case] is this: Judges decide the scope-of-protection issue in *negligence per se* cases because as a generic matter—as a matter of institutional tradition entirely extrinsic to the law of negligence—the business of discerning what was "intended by the legislature" falls into the realm of legal expertise.<sup>86</sup>

Thus, judges decide legal cause in violation-of-statute cases because they always have, and perhaps more importantly, they decide the scope of the statute's protection because they are better trained than juries to interpret the (legal)

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83. *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964).

84. Galligan, *Duty Risked to Death?*, *supra* note 49, at 90-92.

85. *Inspired Ramblings*, *supra* note 4, at 1120-23.

86. *Continuing Causation Confusion*, *supra* note 1, at 20.

language which the legislature has employed. Better training and greater experience with statutes is, I believe, the "matter of institutional tradition" to which Dave refers.

But, aren't there other non-violation-of-statute cases where the scope-of-protection issue raises issues or concerns with which judges, because of their training and experience, are better able to deal than lay jurors? If the scope-of-protection issue concerns some critical social policy or the creation of a potential administrative expense (read "flood gates") or if the risk of inconsistent results in similar cases is so great that the system risks having egg on its face, aren't judges better prepared than jurors to decide such things? Perhaps Dave's answer to this is that such policy concerns should be dealt with at broad categorical levels when courts determine duties owed to classes of people, *not* the scope of the duty to exercise reasonable care in a particular case. But is that always the case? Are there no cases in which some policy (with which a judge may be more familiar than a juror) is critical at the particular plaintiff/particular defendant/particular risk level? It would seem that it might be appropriate for a court to seize the scope-of-protection issue in a case where the jury might conclude a particular risk was unforeseeable but some critical policy, or even the judge's sense of fairness and consistency, mandated imposition of liability despite the lack of foreseeability. Since I usually believe it is appropriate to limit liability to foreseeable risks, given recent legislation on the subject, I do not believe such cases will be common (which is one of the reasons why the *Wagon Mound I* approach seems consistent with present day notions of morality, culpability, and responsibility). However, I do believe there are cases where foreseeability is not a sound guide,<sup>87</sup> and perhaps these are cases where judges, even trial judges, should take a more active role in defining the scope of protection.

Dave, as I have quoted above, believes that since the so-called "rule of law" at stake in a garden variety negligence case is implicitly articulated by the jury, the jury is in the best position to determine its scope. Again, I agree in the normal tort case. Not only are Dave's justifications persuasive but it is hard for a court to articulate the scope of duty in a case where there is a wealth of dispute about the facts and those disputes are not settled until the jury returns. In such a case, how can a judge really know what the jury decided about the facts? Can a judge know what the jury articulated as its "rule of law"? Not unless the interrogatories submitted were a series of detailed factual questions. In such cases the *Keetonian* model is most sensible and efficient. However, I believe the Green and Malone approaches to duty/risk become rather attractive in a jury case where there is not a whole lot of factual dispute (where the "rule of law" will be clear). I also believe they are appropriate methods of decision, as I have said, where some policy other than basic fairness (the community norm most frequently at stake and applied in negligence cases) is at stake. Additionally, it

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87. See *supra* cases cited in notes 81-83.

is apt for the judge to decide the scope of the defendant's duty in a case where the judge believes there is a grave risk of jury error or inconsistency. Finally, but I reserve the right to amend my list in later writings, the judge can more comfortably decide the scope of the risk, as Green and Malone would have him or her do, in a case tried to the court, because there the judge decides questions of fact, questions of law, and mixed questions of fact and law.

Another of Dave's objections to having judges decide the scope of protection or legal cause element is that, under the current rubric, anything the judge decides in a jury trial is law, reviewable de novo on appeal, whereas anything the jury decides (traditionally) is less aggressively reviewed.<sup>88</sup> I think Dave is worried that if judges decide legal cause or scope of protection that such decision making would make the issue the subject of more aggressive appellate review. Concomitantly, the appellate decision will be so sanitized that it will lose some reliability. Dave points out that in order to aptly decide legal cause in a particular case, the factfinder must hear "enough evidence to know in a fairly precise way why and to what extent the defendant's conduct was blameworthy."<sup>89</sup> That was part of what prompted me to say that the Green/Malone approaches to duty/risk were ill-suited to a case with a whole lot of factual fights. However, I note some irony in our agreement on that point.

The irony is that one of the things which prompted Leon Green to articulate his version of duty/risk was that appellate courts when deciding proximate cause issues were sometimes pulling a fast one. He thought that while courts paid lip service to the old saw that proximate cause was a jury question (and thus subject to deferential appellate review), appellate judges, in fact, were more willing to overturn jury decisions on proximate cause than other jury decisions. In essence, Green said, "Look, you appellate judges are treating proximate cause like a legal issue anyway so why not make it a legal issue"? If appellate judges *do* treat legal cause or scope of protection like an issue of law, even when the jury is the relevant decision maker, then is it hopeless for us to call legal cause a jury issue to prevent the legal cause issue from being reviewed as a matter of law? So it goes.

Additionally, and maybe most importantly for practical purposes, one should note that while the *Keetonian* model is used by Louisiana courts, it is not the only method used. Courts still employ the Green/Malone duty/risk method of analysis. And in so doing, courts decide scope of protection. To prove my point, at least to myself, I went to the bookshelf and pulled down an advance sheet for the Southern Reporter.<sup>90</sup> This is certainly not systematic legal research. But I was curious as to whether I would quickly and easily find courts using the Green/Malone approach. Within minutes, I found two cases where

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88. The word "traditionally" is in this sentence because of the recent "brouhaha" about the standard of review in breach decisions. See *Allocating Authority*, *supra* note 2, at 1106-08 and *Inspired Ramblings*, *supra* note 4, at 1125-30.

89. *Continuing Causation Confusion*, *supra* note 1, at 21.

90. It was advance sheet number 23, dated June 5, 1997.



different judges on the Louisiana Third Circuit Court of Appeal utilized the Green/Malone approach to analyze scope of protection.<sup>91</sup>

In *Francisco v. Joan of Arc, Inc.*,<sup>92</sup> Jeansonne was injured in an accident at the canning company at which he worked when a stack of cans fell on him. Unable to cope with the emotional distress his injuries caused, Jeansonne committed suicide. Among others, Jeansonne's survivors sued the former owners of the canning company "who allegedly had developed the method of stacking the cans that caused the injuries."<sup>93</sup> Defendants retained no control or interest in the business. The trial court granted the defendants' motion for summary judgment, concluding the defendants owed Jeansonne no duty. In an opinion by Judge Amy, the court affirmed, concluding the previous owners owed Jeansonne no duty concerning can stacking and injuries arising therefrom because, in part, Jeansonne's employer had "had adequate time to evaluate and revise the procedures for stacking the cans of produce prior to shipping."<sup>94</sup> The opinion is pure Green/Malone and vintage Cardozian in its fact-specific "no duty" determination.

In the second case, *Tassin v. State Farm Insurance Co.*,<sup>95</sup> Judge Saunders, writing for the court said:

[W]e must examine whether the trial court in this case erred as a legal proposition in concluding that the State's duty to maintain the shoulder of Highway 8 extended to encompass the risks that one driver would block the travel portion of the roadway and that another one, driving while intoxicated, would ignore warnings of otherwise imminent peril.<sup>96</sup>

The court held that the trial court had erred and that:

[T]he law does not impose upon the State a duty so broad as to encompass risks attributable to the voluntary actions of third parties, no matter how well intended.<sup>97</sup>

Clearly, Judge Saunders decided the scope of protection as a matter of law as Green and Malone counseled. In his opinion, Judge Saunders included an extensive quote from Louisiana's most famous Green/Malone duty/risk case, *Hill v. Lundin & Associates, Inc.*<sup>98</sup> Within that quote is a quote from Malone,

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91. *Francisco v. Joan of Arc, Inc.*, 692 So. 2d 598 (La. App. 3d Cir. 1977); *Tassin v. State Farm Ins. Co.*, 692 So. 2d 604 (La. App. 3d Cir. 1997).

92. 692 So. 2d 598 (La. App. 3d Cir. 1997).

93. *Id.* at 599.

94. *Id.* at 602. The case might be viewed as a "shifting responsibility" case. See, e.g., *Goar v. Village of Stephen*, 196 N.W. 171 (Minn. 1923).

95. 692 So. 2d 604 (La. App. 3d Cir. 1997).

96. *Id.* at 607-608 (emphasis added).

97. *Id.* at 608 (emphasis added). Apparently, the rescue doctrine would not stretch so far.

98. 256 So. 2d 620, 623 (La. 1972), quoted in *Tassin v. State Farm Ins. Co.*, 692 So. 2d 598,

indicating that a court cannot escape the scope-of-protection issue. While one might claim *Tassin* is a violation-of-statute case because the state has a statutory duty to maintain highway shoulders,<sup>99</sup> the court cites, but never quotes, the statute as most of the law relating to shoulder maintenance is jurisprudential due to the breadth of the statutory provision.

Not only do the courts of appeal still employ the Green/Malone approach, but so does the supreme court. In *Meany v. Meany*,<sup>100</sup> the court held that a former wife could maintain a negligence action against her former husband for negligently infecting her, during their marriage, with various strains of herpes and other sexually transmitted viruses. Importantly, for present purposes, is Chief Justice Calogero's discussion of the allocation of decision making responsibility in a negligence action. It is sufficiently significant to merit extensive quotation, which I will break up with commentary. Chief Justice Calogero wrote:

When a plaintiff articulates a general rule or principle of law that protects his interests, it is necessary for the court to determine whether the rule is intended to protect him from the particular harm alleged, an inquiry which involves both the duty and causation elements of the negligence formulation.<sup>101</sup>

The reader will note that Chief Justice Calogero said it was necessary for the court to determine the scope of protection, not the jury. He also noted that the issue merges or involves both duty and cause—legal cause. This merger or involvement of both duty and cause seems to be exactly what Green and Malone would call duty/risk.<sup>102</sup> The Chief Justice continued in *Meany*:

The court must make a policy determination in light of the unique facts of the case. Thus, the duty-risk analysis requires the court to take into account the conduct of each party as well as the particular circumstances of the case.<sup>103</sup>

Again, note the reference to the court having to make the policy decision, which must be made in light of the *particular* circumstances of the case, not just the general classes to which the parties and risks belong. The Chief continued:

In determining whether to impose a duty in a particular situation, the court may consider various moral, social, and economic factors, including whether the imposition of a duty would result in an unman-

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608 (La. App. 3d Cir. 1997).

99. La. R.S. 48:21 (1984 and Supp. 1997).

100. 639 So. 2d 229 (La. 1994). The court in *Francisco* cited and relied upon *Meany*. *Francisco v. Joan of Arc, Inc.*, 692 So. 2d 598, 601 (La. App. 3d Cir. 1997).

101. *Meany*, 639 So. 2d at 233.

102. See Galligan, *Patterns of Negligence*, *supra* note 49, at 1521-24.

103. *Meany*, 639 So. 2d at 233 (citation omitted).

ageable flow of litigation: the ease of association between the plaintiff's harm and the defendant's conduct; the economic impact on society as well as the economic impact on similarly situated parties; the nature of the defendant's activity; moral considerations, particularly victim fault; and precedent as well as the direction in which society and its institutions are evolving.<sup>104</sup>

It is as complete a list of the relevant factors as one can imagine. They are described broadly and grandly, and yet the Chief Justice contemplated that these broad factors would bear upon the particular facts of each case. This is a judge's masterful description of the Green/Malone method. But, the Chief Justice went on to describe the jury's role as well, stating:

Once the court finds that a duty exists, the trier of fact must decide if that duty has been violated by defendant. In a negligence action, the jury must decide whether defendant's conduct conformed to the standard of conduct of a reasonable man under like circumstances. Various factors considered in the "reasonable man" analysis include the likelihood of the harm; the gravity of the harm; the burden of prevention; and the social utility of the defendant's conduct. And under traditional negligence concepts, the duty to take reasonable steps to protect against injurious consequences resulting from the risk is based on the defendant's actual or constructive knowledge.<sup>105</sup>

One notes that what the Chief would have the jury decide under this formulation of negligence is the breach issue: did the defendant exercise reasonable care under the circumstances? The jury would *not* decide legal cause because the judge would have decided that as part of the duty/risk question.

*Meaney* was an appropriate case for the court to seize the scope-of-risk question because it involved a "new" issue for Louisiana: when would one person be liable for infecting another with a sexually transmitted disease? In such a case of first impression, the court may be more desirous of establishing guidelines or considering limits if a duty is recognized. An apt example of a court adopting such guidelines or limits is the supreme court's decision in *Lejeune v. Rayne Branch Hospital*.<sup>106</sup> There, the court overruled 150 years of jurisprudence and recognized a claim for bystander emotional distress in a negligence case, but articulated guidelines or limits on recovery.<sup>107</sup>

Getting back to Robertson, as Dave has pointed out, the supreme court and the lower Louisiana courts also use his *Keetonian* approach. That's okay with

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104. *Id.* (citation omitted).

105. *Id.* at 233-34 (citations omitted).

106. 556 So. 2d 559 (La. 1990).

107. The legislature thereafter codified the claim. La. Civ. Code art. 2315.6. See Maraist and Galligan, *supra* note 64, § 5-8, at 127.

me. As I have indicated, and will do so in more detail below, I don't think the *Keetonian* approach is as simple as Dave does, but I do see its pro-democratic, pro-trial court value. I just don't think we should rule out the Green/Malone approach. In fact, in *Pitre v. Opelousas General Hospital*,<sup>108</sup> the supreme court expressly approved the use of both the Green/Malone model of negligence and the *Keetonian* model.<sup>109</sup> I am now arguing that the court was wise in doing so and that it was equally wise to preserve the Green/Malone approach in other cases, like *Meany*.<sup>110</sup>

By way of summary on this point, I generally think that in cases tried to juries, the jury ought to decide legal cause. So I think Robertson's *Keetonian* approach may be preferable, but only most of the time. I do not think juries should always decide legal cause. I have set out the reasons above and will not repeat myself. But let me add one additional thing. Many of Robertson's reasons for adopting the *Keetonian* model of negligence relate to tradition and standard practice. They are sound and persuasive reasons. One expects no less of Dave. That is part of the burden of being such an outstanding teacher and scholar.

However, to adopt the *Robertson/Keetonian* model of negligence for every non-violation of statute case eschews some other meaningful traditions, especially in our state. For one, to adopt the *Keetonian* model across the board is to reject perhaps the most famous torts opinion in American jurisprudence, Cardozo's opinion for the majority in *Palsgraf*. Moreover, Louisiana, arguably more than any other state, has a rich and vibrant tradition, inspired by Wex Malone, such that it is appropriate for judges to decide the scope-of-duty issue. It seems a shame to abandon that tradition when it still has current meaning to many judges in many cases.

## VII. A RUNNING RECAP

Let me now recap what Robertson would have judges and juries do in negligence cases under his *Keetonian* model. First, he would save duty, or more accurately "no duty," for those cases where it can categorically be said that the defendant or class of persons to which the defendant belongs owes no duty to the plaintiff or class of persons to which the plaintiff belongs or owes no duty to guard against the broad type of damages which the plaintiff seeks. Notably, under the *Keetonian* approach, the duty or no duty decision is made at a broad level of generality. It is not case-specific. None of what Cardozo did in *Palsgraf* is here, nor is Green/Malone duty/risk here.

Absent a broad "no duty" rule, Robertson, like Judge Andrews, would say that each of us has a duty to exercise reasonable care to protect others from (an

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108. 530 So. 2d 1151 (La. 1988).

109. *Id.* at 1155. See Maraist and Galligan, *supra* note 64, § 5-5, at 106-08.

110. See also *Gresham v. Davenport*, 537 So. 2d 1144 (La. 1989).

array of) foreseeable risks of harm. I made the mistake in *Inspired Ramblings* of opining that, at such a broad level of generality in the normal case (absent a "no duty" rule), duty was "meaningless."<sup>111</sup> In a footnote in *Continuing Causation Confusion*, Dave says:

I don't agree that the ease with which the duty element is often satisfied makes that concept "meaningless," as Professor Galligan states in *Inspired Ramblings*. . . . When duty is easily established, this simply means that the law is clear. The law is at its most meaningful when it is clear. Galligan probably used "meaningless" in the sense of "uninteresting."<sup>112</sup>

Uninteresting, yes, but I also do not see much analytical clarity or predictive force in the statement that (absent a broad "no duty" rule) everyone owes a duty to everyone else to protect against foreseeable risks of harm. That is not clarity; it is platitude. It may be a symbolically significant platitude, but it is not clear law, not like the mailbox rule. Moreover, and this is a more important point, if duty is the only one of the five elements of Negligence (with a capital N) that the judge decides and duty is reduced (or expanded, depending upon your view of the world) to a platitude, then in the mine run of negligence cases, the judge has no substantive role to play. In the mine run of cases, the judge is not a gardener so much as a tourist at an out of control substantive jungle planted and inhabited by lawyers and lay people. Or, if you prefer my metaphor, the judge is the trainer and the rest of the people in the court room are the cats. And, they are not rolling over. In any event, for Dave's *Keetonian* model, duty, if not meaningless, is not a significant hurdle. It is a given.

Then, turning to breach under the *Keetonian* model, the jury decides whether the defendant acted reasonably under the circumstances. In making this determination, the jury must consider an array of risks, not just the one which occurred in the case it is deciding. If the jury considered only the risk which occurred in the particular case it was deciding, the jury would be improperly collapsing the breach and legal cause issues. It would be perpetrating the *Wagon Mound I* aberration. And Dave condemns that aberration. Breach depends upon the array of foreseeable risks. However, Dave's jury instruction on breach contains no reference to the array of foreseeable risks, which he believes is relevant at the breach level, as opposed to the particular risk.

If juries are not to consider the particular risk, or only the particular risk, when deciding breach, shouldn't judges tell them so? Especially if the failure to consider the array of risks may unnecessarily limit liability? Perhaps, the answer is that the common definition of negligence imports a consideration of an array of possible risks and not just the one which occurred in the case before the court. If that is the case, then maybe juries do not have to be told to

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111. *Inspired Ramblings*, *supra* note 4, at 1120.

112. *Continuing Causation Confusion*, *supra* note 1, at 6 n.17.

consider the array of risks posed by conduct because that is what they will naturally do. Alternatively, can we say for sure that some jurors won't focus on the particular risk which transpired and that risk alone? After all, that is *the* risk they are being asked to make a decision about? Whatever, the point for Robertson is that at the breach level, the jury must consider the defendant's conduct in light of an array of risks, *not* just the one which occurred in the particular case it is deciding.

Then, after having decided breach, the jury must turn to cause-in-fact. At cause-in-fact, the jury must focus in on the particular case. Here, the jury leaves the array of risks behind and moves to the particular defendant's particular negligence and the particular plaintiff's particular injuries. In deciding cause-in-fact under the "but for" test, the jury must construct a counterfactual hypothetical, asking itself what would have happened if the defendant had not been negligent. So, after considering the array of foreseeable risks at breach, the jury when deciding cause-in-fact must then focus on the particular case. But, when doing so, it must resort to a counterfactual hypothetical. Can the jury keep all this straight?

Then, when the jury decides proximate or legal cause, the jury leaves behind the just answered cause-in-fact question and decides whether the risk which occurred was included in the scope of protection of the rule of law implicitly articulated at the breach stage. That is, at legal cause the jury must focus on the particular risk which occurred and then refocus on the breach decision to decide whether the particular risk which occurred was one of the array of risks which made what the defendant did a breach of its obligation to exercise reasonable care toward the plaintiff. And, in making that legal cause determination, the jury is told to consider foreseeability.

As I said, the *Keetonian* model is a common and workable solution to the question of how to make decisions in negligence cases. But, I am not convinced it is more simple than, or preferable to, the *Wagon Mound I* breach/proximate cause collapse or the Green/Malone duty/risk approach which collapses duty and proximate cause. Under the *Wagon Mound I* approach, the jury has less jumping around to do from general to particular. The jury answers one question based on the particular rather than two questions, one based on the general and another based upon the particular and the particular's relation to how it answered the general question. In the Green/Malone duty/risk approach, the jury again answers the breach question but not the proximate or legal cause question (although it certainly can consider factors relevant to proximate cause when it decides breach). There is less jumping around under both the *Wagon Mound I* approach and the Green/Malone approach. There is less for the jury to keep separate. While juries are the common sense voice of the community and we obviously want their input, keeping the jury's job as simple and easy to explain as possible is a big plus.

However, as I said, I think it is desirable in many types of cases to employ Dave's *Keetonian* approach to negligence. I especially feel it is appropriate in a case with intense and multiple factual disputes and in a case where the scope

of protection depends more or less upon one's basic sense of fairness and not some other social policy like deterrence, compensation, risk spreading, legislative will, administrative convenience, proper allocation of resources, or respect for the value of consistency. While I believe Dave's proposed jury instructions are remarkably easy to understand and complete, I would like to offer a few suggestions of my own. I have already said that I believe that the instructions should be as case-specific as possible. I also believe that instructions should be as simple as possible. At the same time, instructions should be as logical as possible. Here, I use logical to mean logical in a way a person on the street would understand the word; that is, the instructions should be arranged in an order that makes sense.

I think it makes sense to start with a series of instructions or questions dealing with cause-in-fact under the "but for" test. Green and Malone wrote that cause-in-fact should be the first element of negligence. In terms of jury instructions, putting cause-in-fact first makes sense because it forces the jury to focus in on exactly what happened to the plaintiff and exactly what the plaintiff alleged the defendant did wrong (i.e., negligently). Additionally, according to Robertson's *Keetonian* model, the jury will have to decide not only whether the defendant was negligent (i.e., breach), but whether the risk which occurred (and how it occurred) was one of the risks which made the defendant negligent (i.e., proximate or legal cause). Since these inquiries are linked (if not combined, as under the *Wagon Mound I* aberration), it makes sense that the two issues (breach and legal cause) are linked and *not* separated by cause-in-fact.

Enough explanation, here are my proposed instructions or interrogatories on cause-in-fact, breach, and legal cause, following Robertson's *Keetonian* model:

#### *Cause-In-Fact*

- 1) *Identify what the plaintiff claims defendant did (or failed to do) negligently.*
- 2) *Identify those injuries<sup>113</sup> plaintiff claims to have suffered as a result of defendant's alleged negligence.*
- 3) *Did what the defendant did (or failed to do) cause the plaintiff's injuries? Or, would the injuries have resulted anyway? You may find that what the defendant did (or failed to do) caused some, but not all, of the plaintiff's injuries.*

#### *Breach*

- 1) *Now you must once again consider what the plaintiff claims defendant did (or did not do).*
  - a) *Did defendant do (or fail to do) what plaintiff alleges?*

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113. I have used the generic word "injuries" here. It could include damage to one's person, property, or relationships. Some more particularized instructions might be needed here to more fully develop the meaning of injury in certain types of cases like wrongful death cases or loss of consortium cases.

2) *Was what defendant did (or failed to do) negligent? Negligence is the failure to act reasonably under the circumstances.*

#### *Legal Cause*

1) *Now, you must once again consider how defendant was negligent. Was what happened to plaintiff, or the way in which it happened, foreseeable to a reasonable person before defendant acted (or failed to act)?*

*Alternative: Now, you must once again focus on how defendant was negligent. Is it fair and just, under all the circumstances, including what was foreseeable to a reasonable person when defendant acted (or failed to act) that defendant (whom you have decided behaved negligently) be held liable for plaintiff's damages?*

The reader will note that I have simply used the word "cause" in my third cause-in-fact instruction, with a "tag-on" clause about whether the injury would have happened anyway. I have left necessary contributing factors out of it. Likewise, while I have relied upon foreseeability in my legal cause instructions, I have added an alternative instruction under which the court may ask the jury to consider its basic sense of fairness and justice. I do not think it is wrong to ask the jury to consider such things. After all, isn't it the jury's sense of fairness and justice that leads us to have juries in the first place? And, with legal cause, if we do give the issue to juries to decide, don't we want juries to rely upon their common sense notions of fairness and justice? And, finally, won't jurors understand such terms and their normative import better than words like "natural," "direct," "remote," "independent," "intervening," "superseding," and "ease of association"? I think so.

Let me close this section by noting that under a *Wagon Mound I* approach, breach and legal cause could be combined to ask whether the defendant should have reasonably foreseen the particular risk which occurred and whether, in light of that risk, the defendant acted negligently. Alternatively, under the Green/Malone approach, there would be no legal cause instruction at all but only instructions on cause-in-fact and breach. In the next section, I will switch gears and attempt to show how Louisiana law continues flexibly to apply several different approaches to negligence in one rather broad area: cases involving victim fault, victim knowledge of a risk, and comparative fault.

### VIII. VICTIM FAULT AND FLEXIBLE APPLICATIONS

Professor Robertson has long objected to courts and commentators who believe that after the advent of comparative fault the particular victim's fault effectively can act as a bar to recovery. He does not believe that a negligent victim can ever be the sole proximate cause or sole legal cause of his or her



injuries.<sup>114</sup> To so find is to reintroduce contributory negligence or secondary implied assumption of the risk through the back door. These reintroductions, he contends, are violative of Louisiana Civil Code article 2323 and improperly move an affirmative defense (whose effect is to reduce recovery) to the plaintiff's case-in-chief at the legal cause element. You recall that, to Robertson, the plaintiff's case-in-chief is on page one of the negligence pamphlet while the defendant's affirmative defenses are on page two. You also recall that Dave does not believe things should be moved "willy-nilly" from one page to another. Robertson calls the various page-shifting devices for "zeroing" the negligent plaintiff the "Johnson heresy" named after H. Alston Johnson, III, with whom Robertson has debated the topic in print and on podia throughout the last fifteen years or so.

While Robertson has some impressive victories in this battle between intellectual torts giants, there have been some setbacks as well. The setbacks reveal that courts continue to flexibly approach negligence problems. Let us run through a few of the cases, starting with *Murray v. Ramada Inn*.<sup>115</sup> In *Murray*, the plaintiff's decedent, who was actually aware of the risks of diving into a shallow pool, did so anyway. The pool owner was at fault in not having a lifeguard present, among other particulars. The diver was rendered a quadriplegic and later died as a result of his injuries. The defendant asserted the defense of assumption of the risk which it claimed survived the enactment of Louisiana's comparative fault regime. The court held that secondary implied assumption of the risk, unreasonably encountering a known (unreasonable) risk, did not survive as a bar to recovery under the institution of comparative fault, but was instead merged into comparative fault.<sup>116</sup>

Alternatively, the defendant pool owner argued that even if assumption of the risk did not survive, it owed no duty to a plaintiff who was aware of the actual risk of harm his faulty conduct posed. This argument was a form of the "Johnson heresy." The court rejected the "no duty" contention, concluding that to define the defendant's duty in light of what the particular plaintiff knew would be to reintroduce assumption of the risk "through the back door."<sup>117</sup> The defendant's duty, according to the court, extended to all potential users of the pool; that is, all blameless users of the pool. A particular plaintiff's knowledge insofar as it impacted upon fault would be relevant to the quantification of fault but not to the definition of the defendant's duty.

*Murray* essentially adopted Robertson's view of the post-comparative fault/victim fault world. The defendant's duty was extended and was analyzed in terms of that broad category of blameless plaintiffs who might use the pool. Moreover, according to the court, the particular plaintiff's fault, no matter how

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114. *Continuing Causation Confusion*, *supra* note 1, at 29.

115. 521 So. 2d 1123 (La. 1988).

116. *See generally* Maraist and Galligan, *supra* note 64, §§ 9-12(a)-(b).

117. *See id.* § 9-12(c), at 208.

egregious and which involved actual knowledge of the risk of shallow water diving, would reduce, but not bar, recovery. To turn to Robertson's pamphlet, defendant's duty stayed on page one and plaintiff's fault stayed on page two. Several post-*Murray* decisions echoed its holding and approach.<sup>118</sup>

However, the results and the approach have not been uniform. Two years after *Murray*, the court decided *Washington v. Louisiana Power and Light*.<sup>119</sup> Let me quote what Professor Frank L. Maraist and I have written about *Washington*:

There, the victim was a CB radio buff who maintained a tall antenna in his yard, near an uninsulated electrical distribution line owned by defendant. In 1980, the victim received an electrical shock when the antenna came into contact with the electrical wire line while he was moving it. The victim told relatives and others that the accident had made a great impression on him and that he was aware of the need for precaution. Five years later, the victim was found dead in his backyard, with the antenna lying nearby. Apparently, he had moved the antenna and once again it had come into contact with the distribution line; this time the consequences were fatal. The jury awarded damages to the victim's wrongful death beneficiaries, but the appellate court reversed, concluding that the defendant had not breached any duty owed to the victim. The Supreme Court affirmed, holding that the burden of insulating or otherwise protecting against electrocution risks from the electrical line was greater than the probability of the accident happening times the loss that might arise if an accident occurred. One of the reasons why the Court found that the probability of the accident was low was the fact *decedent had knowledge of the particular risk he encountered*. In essence the Court used the victim's actual knowledge of the risk to bar his recovery, under the guise of concluding that the uninsulated electric wires were not unreasonably dangerous.<sup>120</sup>

The court did not use the plaintiff's knowledge of the particular risk to define the defendant's duty; that would have been explicitly inconsistent with *Murray*. But, the court did use the defendant's knowledge of the actual risk to find that the defendant did not breach its duty to the particular plaintiff. Arguably, this is not inconsistent with *Murray* because a judge did not decide defendant owed the plaintiff no duty based upon the plaintiff's knowledge. Instead a factfinder

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118. See *Socorro v. City of New Orleans*, 579 So. 2d 931 (La. 1991) and *Molbert v. Toepfer*, 550 So. 2d 183 (La. 1989). But see *Deumite v. State*, 692 So. 2d 1127 (La. App. 1st Cir. 1997) (holding that shallow water (3') in False River is not unreasonably dangerous because the diver is in the best position to check depth).

119. 555 So. 2d 1350 (La. 1990), discussed in Maraist and Galligan, *supra* note 64, at § 9-12(c), at 208-09.

120. Maraist and Galligan, *supra* note 64, § 9-12(c), at 208-09; see also Galligan, *Duty Risked to Death?*, *supra* note 49, at 80-82.

decides there was no breach based upon a particular plaintiff's knowledge.<sup>121</sup> The result to the plaintiff is the same. Either way, plaintiff recovers zero.

*Washington* is inconsistent with Robertson's views because in deciding breach the court analyzed the particular risk, not the general array of risks. It is an application of the *Wagon Mound I* approach. Additionally, it is somewhat inconsistent with Robertson's views because the fault of the plaintiff effectively barred recovery.<sup>122</sup> A page two concern (victim fault) moved to page one to justify a conclusion that the defendant did not breach its duty to the plaintiff. To me, *Washington* is proof of the inherent flexibility of the negligence process.

Another more recent case, somewhat akin to *Washington*, is *Pitre v. Louisiana Tech University*.<sup>123</sup> Earl Pitre, Jr. was a south Louisianian, unaccustomed to the joys or dangers of snow. While Pitre was a student at Louisiana Tech, it snowed and he went riding down a hill backwards on a garbage pail lid with several friends. Tragically, the lid collided with a concrete light stanchion at the base of the hill and Pitre was rendered a paraplegic.<sup>124</sup> The trial court twice dismissed Pitre's claims against Tech, only to be twice reversed by the court of appeal, which concluded Tech owed a duty to Pitre. Finally, the supreme court heard the case and concluded that Tech owed no duty to Pitre to protect against the risk which occurred because the burden of preventing the injury was greater than the probability of the risk occurring times the anticipated gravity. Put algebraically,  $B > P \times L$ . As I pointed out in *Inspired Ramblings*,<sup>125</sup> one of the interesting features of the case is that it collapses the breach and duty elements. The defendant owed no duty to the plaintiff because the risk encountered was not unreasonable. Here, the case is of relevance because it represents another case where the victim's fault in encountering a risk of which he should have been aware resulted in no recovery whether the case is viewed as a "no duty" case or as a "no breach" case (because the risk was not unreasonable).<sup>126</sup> Arguably, a page two issue (victim fault) moved to page one (duty or breach).

In another case, *Celestine v. Union Oil Company of California*,<sup>127</sup> the court addressed the liability of a building owner to a repair person<sup>128</sup> injured by the

121. Ironically, the jury had apparently decided the other way in *Washington*, but the court found the jury's decision was manifestly erroneous. *Washington*, 555 So. 2d at 1351.

122. Of course one could say that *Washington* is consistent with Robertson's views since the factfinder (on appeal at least) decided no breach. Thus, defendant was not at fault. But even then there is the problem of the *Wagon Mound I* aberration.

123. 673 So. 2d 585 (La. 1996).

124. Heroically, since the accident Pitre has completed both college and law school.

125. *Inspired Ramblings*, *supra* note 4, at 1121.

126. One could conclude the risk was not unreasonable for anyone, not just Earl Pitre and those sledding that night. That is, the risk was so open and obvious that Tech had no obligation to guard against it. So analyzed, the case is consistent with *Murray*.

127. 652 So. 2d 1299 (La. 1995), discussed in Maraist and Galligan, *supra* note 64, § 9-12(c), at 209.

128. The case was a strict liability case under Louisiana Civil Code article 2322; however,

defective condition of the building which the repair person was hired to repair. In its holding, the court refused to promulgate a *per se* rule that a building owner owed no duty to a repair person. Instead the court held that the factfinder should consider the plaintiff's status as a repair person, a fact which would be most relevant to the decision whether the building presented an unreasonable risk of harm. The unreasonable risk of harm criterion in strict liability cases was akin to the breach decision in negligence cases. The import of *Celestine* was that the status and presumably the knowledge of the plaintiff was relevant to the determination of breach. Thus, the jury would determine breach in such cases, in reference to the status and knowledge of the particular plaintiff, not the general array of risks. *Celestine* then is like *Washington*. In neither case was the general array of risks posed to blameless, anonymous members of the public the focus. Rather the focus, in part, was the knowledge and experience of the particular plaintiff.

Similarly, in a failure-to-warn product liability case under the Louisiana Products Liability Act ("LPLA"), the manufacturer need not warn when "the user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic."<sup>129</sup> Here again, as in *Celestine*, *Washington*, and arguably *Pitre*, there is no liability to *some* particularly aware or knowledgeable plaintiffs. While *Celestine* and *Washington* were "no breach" cases, the LPLA section on aware users and warnings could be read, like *Pitre*, to express the notion that there is no duty owed to provide a warning to someone aware of the risks of the product. Here a page two concern (victim fault or knowledge) is moved to page one to justify a "no duty" determination.

The warning section of the LPLA is not the only section of the act which deals with "victim fault." The LPLA provides that, in order to recover in tort from a manufacturer, the plaintiff's use of the product must have been "reasonably anticipated."<sup>130</sup> A "reasonably anticipated use" is "a use or handling of the product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances."<sup>131</sup> If the use is not reasonably anticipated, there is no LPLA claim. While a court would seem to be able to read "reasonably anticipated" to include foreseeable misuse,<sup>132</sup> it might also conclude that victim fault, if it amounted to a use of a product which was not "reasonably anticipated," would bar recovery. Indeed courts have so held. For instance, in *Myers v. American Seating Co.*<sup>133</sup> the appellate court found that standing on the back part of a folding chair was not a reasonably

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because of the close relationship between strict liability (as it existed at the time *Celestine* was decided) and negligence, the case is still most relevant for present purposes.

129. La. R.S. 9:2800.57(B)(2) (1991).

130. La. R.S. 9:2800.54 (1991).

131. La. R.S. 9:2800.53(7) (1991).

132. Galligan, *supra* note 73, at 639.

133. 637 So. 2d 771 (La. App. 1st Cir.), writ denied, 644 So. 2d 631 (1994).

anticipated use, which meant there was no right to recover at all. A finding that a use is not reasonably anticipated is akin to a conclusion that the manufacturer owes the plaintiff no duty to guard against an otherwise unreasonable risk of harm.<sup>134</sup> A page two concern, victim fault, moves to page one to justify a "no duty" decision.

To leave Louisiana for a moment, another related issue involves plaintiff conduct as a superseding cause. That is, can the plaintiff's conduct ever be so extraordinary that it is appropriate to use it as a superseding cause to relieve the defendant of liability to the plaintiff? Under a comparative fault system? To do so would seem inconsistent with Robertson's approach to comparative fault and the allocation of decision making responsibility. It would take a page two item, victim-fault, and move it to page one, the plaintiff's *prima facie* case, to negate an element, legal cause. Some courts have held that it is generally not appropriate, after the advent of comparative fault, to use a plaintiff's conduct as a superseding cause. As an Iowa appellate court has said:

Generally, the doctrine of intervening cause embraces the intervention of the acts of a third party or an outside force, not the actions of the injured party. . . . The principles of comparative fault could be seriously diluted by utilizing the conduct of the plaintiff as an intervening cause. The preferred approach is to judge the conduct of the plaintiff under comparative fault.<sup>135</sup>

However, all courts have not agreed. Perhaps most tellingly, last year in an admiralty case, the United States Supreme Court held in *Exxon Company, U.S.A. v. Sofec*<sup>136</sup> that the plaintiff's fault in causing a vessel to run aground was a superseding cause relieving other defendants of responsibility for the accident. Moreover, despite Robertson's protestations,<sup>137</sup> Louisiana courts continue to use the phrases "sole cause"<sup>138</sup> or "sole proximate cause," indicating a legal conclusion about liability rather than a conclusion about cause.

Once again, these are all areas where the law has flexibly treated the issue of victim fault or victim knowledge. In some of the cases, consistent with Robertson's *Keetonian* approach, the court left to the jury the allocation of fault, limiting the duty analysis to broad categories of plaintiffs and defendants. In others, the courts were more fact-specific, concluding either that the defendant owed the particular plaintiff no duty to guard against the particular risk or that

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134. Even if the jury is asked to decide whether a use is reasonably anticipated, its decision that the use is not reasonably anticipated stops the analysis. There is no reason to consider anything further. The court, based on the jury's finding in such a case and the statutory language, would have to conclude no duty was owed.

135. *Sumpter v. City of Moulton*, 519 N.W.2d 427, 432 (Iowa Ct. App. 1994), cited and quoted in *Dobbs and Hayden*, *supra* note 38, at 260.

136. 116 S. Ct. 1813 (1996).

137. *Continuing Causation Confusion*, *supra* note 1, at 29.

138. *Syire v. Schilhab*, 693 So. 2d 1173 (La. 1997).

the defendant did not breach its duty to exercise reasonable care because its conduct, in light of the specific risk, was not unreasonable.<sup>139</sup>

#### IX. CONCLUSION

One might argue that simply because courts continue to flexibly apply the five (or four) elements of negligence is not to say that it is right for them to do so. Practice does not necessarily make perfect. Maybe it is better to weed out these approaches. But I think the effort isn't worth it. To recall Malone: "The candle is not worth the game." One would think that after almost 200 years of deciding negligence cases under the modern analytical framework, issues of who decided what and precisely where one element of negligence began and another ended would have been finally settled. But, such issues are decided, then they are undecided and unsettled. Courts continue to approach the decision of negligence cases with flexibility. They are not chained to any one approach or allocation of decision making authority.

There is probably a majority "approach" or "model" of negligence and Robertson has articulated it and defended it. As always, his work is thought-provoking, insightful, clear as crystal, and provocatively persuasive. But, like any beautiful garden, there is variety and some of the variety grows outside Robertson's rows.

As I wrote this I had just returned from a weekend in British Columbia and a visit to the sublime Butchart Gardens. I recommend it to all. Butchart Gardens, a former cement factory and quarry, is a series of gardens: a sunken garden, a rose garden, a Japanese garden, and an Italian garden, to name a few. Each garden is laid out differently, with its own distinctive design and plants. The variety contributes to the place's overall beauty. To weed out the flowers that do not appear in all the gardens and to re-landscape the place so that each garden looked the same would be tragic. Moreover, the managers simply might not stand for it.

Likewise, courts which have long maintained a flexible approach to negligence have so far withstood efforts to streamline or standardize. Like cats,<sup>140</sup> the courts refuse to roll over for us law professors. So, let us recognize the variety and move to the real issue: should this plaintiff be able to recover from this defendant for this injury which occurred in this manner?

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139. *Id.* at 1178.

140. I want the judges reading this to know I love cats. My family has three of them.

